BOARD MEETING DATE: May 3, 2013 AGENDA NO. 12

PROPOSAL: Adopt SCAQMD Proposals for CEQA Reform

SYNOPSIS: While the California Legislature is not expected to implement dramatic reform of the California Environmental Quality Act (CEQA) this year, several bills are proposed which may become a vehicle for some changes. SCAQMD may be affected by the results of these reform efforts and needs to be actively participating in the process. Staff proposes nine specific concepts for CEQA revisions and recommends they serve as SCAQMD's position on CEQA this year. These concepts were discussed at the Governing Board Retreat on March 15, 2013.

COMMITTEE: Legislative, April 12, 2013, Recommended for Approval

RECOMMENDED ACTIONS:
Adopt the "South Coast Air Quality Management District Proposals for CEQA Reform" (Attachment).

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BB:pa

Background

For a number of years, certain stakeholders have urged that CEQA needs to be reformed to reduce delay, uncertainty, and unjustified adverse impacts on industrial and other developments. SCAQMD staff believes that this year's legislative session provides an opportunity to improve CEQA. SCAQMD prepares CEQA documents for most rules and rule amendments, plan amendments, and projects for which SCAQMD is lead agency, projects such as certain permits. Also, staff prepares comments on numerous CEQA documents prepared by other lead agencies, as reflected in the monthly CEQA report provided to the Governing Board. In general, staff supports a position that would maintain CEQA's protection of the environment, while supporting efforts for appropriate streamlining. Staff recommends adopting the CEQA Reform Proposals set forth in the attachment. Specific provisions of the CEQA Reform Proposals are discussed below.

Proposal

The CEQA Reform Proposals include nine specific elements. The first element addresses industry/development company concerns as well as concerns of lead agencies. Staff proposes that all commenters must provide all of their comments on the draft EIR or negative declaration during the established public comment period, if any, or be foreclosed from raising that issue in court. Agencies would be encouraged to make publicly available the final EIR or negative declaration, or equivalent document, and the CEQA Findings, Statement of Overriding Considerations, and mitigation monitoring and reporting plan, 15 days before the final approval of the project. If the agency does so, commenters would be required to file any comments on those documents, five (5) days before the agency approves the project, or be foreclosed from raising the issue in court. If there is a public hearing, the only comments that could be considered in court would be limited to oral testimony. While this proposal would put new requirements on commenters, including SCAQMD as a commenting agency, they would alleviate the problem of "document dumping" that plagues lead agencies that do not have an adequate opportunity to consider and respond to late-filed comments. Other interest groups have supported similar proposals, such as the American Planning Association and the Public Works Coalition.

The second proposal would require courts, upon request of a party, to specify in a Statement of Decision the basis for deciding whether a project, or a part of a project, may continue to go forward while identified CEQA deficiencies are being corrected. This would facilitate judicial review of the court's decision on that issue.

The third proposal would require a lead agency to obtain the approval of other agencies when identifying the other agency as responsible for implementing a mitigation measure. This would alleviate concerns that public agencies sometimes identify SCAQMD as responsible for implementing mitigation measures without consulting with staff as to whether such a measure is even appropriate or can be implemented by SCAQMD.

The fourth proposal would create a statutory exemption from CEQA for actions by public agencies to adopt CEQA Guidelines, or amendments thereto, or CEQA Thresholds of Significance. This new exemption is necessary because a recent court decision held that the adoption of a CEQA significance threshold by the Bay Area Air Quality Management District was itself a "project" which must be analyzed under CEQA. *Bldg. Indus. Ass'n. v. BAAQMD*, Alameda Sup. Ct. No. RG10548693. This decision could tie the lead agency up in endless "do-loops" of having to analyze CEQA thresholds under CEQA. If an agency concluded, for example, that the CEQA threshold for greenhouse gases had an adverse impact on air toxics exposure, and the CEQA threshold for air toxics had an adverse effect on greenhouse gas emissions, as argued by the building industry, the net result might be having to reduce the protections provided by both thresholds, which is

contrary to the intent of CEQA. Pursuant to the Board's authorization, staff filed an amicus brief in support of the BAAQMD in the Court of Appeal in this case.

The fifth proposal would increase the burden of proof to challenge an environmental regulatory agency's CEQA analysis of the potential adverse impacts on an environmental topic over which the agency has specific jurisdiction when the CEQA document is prepared in connection with a regulatory requirement intended to protect that environmental topic. Environmental regulatory agencies, such as air districts, are charged with the duty to adopt regulations to achieve and maintain state and federal environmental standards. *See, e.g.,* Health & Safety Code § 40001. Regulated industries have misused CEQA to delay needed environmental regulation. For example, in the early 1990s, paint companies sued various air districts under CEQA, arguing that the district rules requiring lower VOC paints would actually increase air pollution. *See, e.g., Dunn-Edwards v. BAAQMD*, 9 Cal. App. 4th 644 (1992). In the South Coast, the paint companies succeeded on only one argument, i.e., that the lower VOC limit would increase thinning of paints with higher-VOC solvents. *Dunn-Edwards Corp. v. SCAQMD*, 19 Cal. App. 4th 519 (1993).

As a result, the SCAQMD rule originally adopted in 1990 was delayed six years until 1996, after CARB and SCAQMD performed various thinning surveys and studies. It is ironic indeed that the regulated industry can invoke CEQA to argue that a duly-considered and adopted air district rule actually increases air pollution. Therefore, staff proposes that in such cases, any CEQA challenge should be subject to the same "arbitrary and capricious" standard of review that applies to all other challenges to SCAQMD (or other environmental agency) rules. However, the "arbitrary and capricious" standard would apply <u>only</u> when the challenge asserts an adverse impact on the same environmental resource that the agency is charged to protect—i.e., air pollution in the case of SCAQMD. If instead, the CEQA challenge argues that there would be an adverse impact on <u>another</u> environmental area, e.g., water, the existing CEQA standards would apply. Thus, the staff proposal would grant deference to the SCAQMD Board in judging impacts on air pollution, but continue to allow CEQA challenges based on other environmental areas, consistent with existing CEQA law.

The sixth proposal would direct the Governor's Office of Planning and Research to prepare a CEQA Style Guide. While Public Resources Code 21003(b) states that it is the policy of the state for CEQA documents to "be organized and written in a manner that will be meaningful and useful to decision makers and the public", it is not uncommon for CEQA documents to be overly long and complex. Recommended page limits are routinely disregarded contrary to guidance in CEQA Guidelines 15141 specifying no more than 150 pages for typical EIR's and 300 pages for unusually complex EIR's. Commonly, the excessive length of EIR's occurs because substantial portions of technical appendices are duplicated within the main body of the EIR. This process can unnecessarily increase the length and introduce text that is taken out of context into the

main body of the EIR. To improve the utility of CEQA for the public and decision makers, the Office of Planning and Research can provide a Style Guide for voluntary use that will promote consistently readable and concise CEQA documents, both in written and online formats.

The seventh proposal would expressly authorize a public agency to use a "future baseline" for evaluating the significance of environmental impacts, where supported by substantial evidence. Several years ago, a Court of Appeal held that a public agency may not use a "future baseline" to evaluate significance of environmental impacts, regardless of whether that baseline was supported by substantial evidence, and stated that to the extent CEQA Guidelines appear to allow such use, they are invalid as conflicting with the statute. *Sunnyvale West Neighborhood Ass'n v. City of Sunnyvale*, 190 Cal. App. 4th 1351 (2010). This case has had real-world effects resulting in an inaccurate assessment of environmental impacts. For example, in the Southern California International Gateway proposed railyard EIR, the Port of Los Angeles took the position that the *Sunnyvale West* case obligated it to use a "present-day" baseline of conditions at the time the DEIR was circulated (2010) rather than a future baseline. As a result, the Port compared air quality in 2010 without the railyard to projected air quality upon full operation in 2035 with the railyard. Because so many new regulatory requirements (and fleet turnover to cleaner vehicles) will occur during that timeframe, the total air pollution in 2035 was calculated to be less than the total air pollution in 2010. So the Port concluded that the project had an air quality benefit. This approach improperly credits the air pollution reductions that would occur anyway to the project itself, and obscures the actual impacts of the project.

For example, under the Port's approach, if a facility emits 100 tons per year in 2010, and is expected to emit 50 tons per year in 2035, due to new rules and fleet turnover, it could propose a modification that would increase its 2035 emissions from 50 tons per year to 75 tons per year—a 25 ton increase. Yet the Port would compare the 100 tons per year in 2010 to the projected 75 tons per year in 2035, and conclude that the project had an environmental benefit. This approach fails to satisfy the requirements of CEQA which demand an analysis of the impacts *of the project*. CEQA Guidelines Section 15064(d). In 2012, a different Court of Appeal rejected the *Sunnyvale West* approach and held that a public agency preparing a CEQA document could use a future baseline where supported by substantial evidence. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 205 Cal. App. 4th 552 (2012). With the Board's authorization, staff filed an amicus brief in the California Supreme Court in this case supporting the use of a future baseline where appropriate. The proposal would explicitly allow such use of a future baseline.

The eighth proposal is to clarify that the exposure of people or projects to existing or reasonably foreseeable environmental effects is an environmental impact under CEQA. Some cases have stated that CEQA documents are not required to analyze the exposure of

people to environmental hazards where the exposure results from the effect of the environment on the project rather than the effect of the project on the environment. *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455 (2011) and cases cited therein. SCAQMD staff typically comments on CEQA documents that involve situations where the environment may adversely impact people as by moving residents into the vicinity of a freeway or railyard. Most lead agencies take the position that this is not a concern of CEQA. This proposal would result in less exposure to hazardous air pollutants by requiring disclosure of such impacts, and avoiding or mitigating significant impacts. A similar proposal is expected to be included in a pending bill, SB 617 (Evans). Additional language may need to be included to conform other parts of CEQA to the language proposed here.

Following the staff presentation at the Legislative Committee, the Committee requested staff to include an additional proposal which would allow defendants in a CEQA case to recover their attorney fees in a frivolous case. Language to do so has been added as Proposal Nine. The language was taken from Code of Civil Procedure § 1038 regarding cases brought under the Tort Claims Act that are resolved on summary judgment in favor of defendant, and Code of Civil Procedure § 1021.7 regarding actions brought against a peace officer, or libel and slander cases.

Resource Impacts

SCAQMD legislative and legal staff would propose and support the proposals in the attachment within budgeted resources.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

PROPOSALS FOR CEQA REFORM 2013

Proposal 1

Public Resources Code Section 21177(a) is amended to read as follows:

An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination. *An action or proceeding shall not be brought based on any written comments that were not filed by the close of the public comment period on a draft document prepared pursuant to this division, if such a comment period is provided, except that an action or proceeding may be brought based on written comments regarding the adequacy of the CEQA Findings, Statement of Overriding Considerations, or Mitigation Monitoring and Reporting Plan, provided that such comments are filed at least five days before the approval of the project, in any case where these documents were made available to the public at least 15 days before the approval of the project.*

Proposal 2

Public Resources Code Section 21168.9(f) is added to read as follows:

(f) *Upon request of any party to the proceeding, including a real party in interest, the court shall include in a Statement of Decision its reasons for determining whether all or any part of a project shall not be ordered to halt pending compliance with any deficiencies in compliance with this division identified by the court.*

Proposal 3

Public Resources Code Section 21081.6(d) is added to read as follows:

(d) *A public agency shall not assign responsibility for implementing a mitigation measure to another public agency without first obtaining that agency's written consent. Nothing in this subdivision shall preclude a public agency from making the finding specified in Section 21081(a)(2).*

Proposal 4

Public Resources Code Section 21080.36 is added to read as follows:

This division shall not apply to any action by a public agency to develop or adopt guidelines or thresholds of significance for its use or use by others in implementing this division.

Proposal 5

Public Resources Code Section 21168.8 is added to read as follows:

In any action or proceeding under Sections 21168 or 21168.5, the determination of an environmental regulatory agency charged by law with the protection of a particular environmental or natural resource regarding the significance or non-significance of an impact on that resource shall be subject to the arbitrary and capricious standard of review whenever the project under review is the approval by the agency of a regulation intended for the protection or improvement of that resource. A city, county, or city and county shall not be considered an environmental regulatory agency within the meaning of this section.

Proposal 6

Public Resources Code Section 21083(g) is added to read as follows:

The Office of Planning and Research shall prepare a CEQA Style Guide for voluntary use that will promote concise and readable CEQA documents. This Style Guide will promote standardized formats for both written and online presentation with an emphasis on improving public disclosure of project impacts. The Style Guide will provide guidance on what type of information should be kept in the main text of the EIR, and what should be put into technical appendices.

Proposal 7

Public Resources Code Section 21082.2(a) is amended to read as follows:

(a) The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record. *A public agency may use appropriate past conditions or projected future conditions, rather than conditions at the time the notice of preparation is published or environmental review is*

commenced, as the baseline physical conditions by which the agency determines whether an impact is significant, where the reasonableness of using such baseline is supported by substantial evidence. A public agency need not use the same baseline for each environmental impact.

Proposal 8

Public Resources Code Section 21002.1(a) is amended to read as follows:

(a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, *to identify the significant exiting or reasonably foreseeable effects of the environment on a project*, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.

Proposal 9

Add Public Resources Code Section 21168.8 to read as follows:

In any action or proceeding filed under Section 21168 or Section 21168.5 alleging noncompliance with the provisions of this division, the court shall award the prevailing defendant or defendants their reasonable costs and attorneys' fees incurred in defending the action, upon a finding made upon noticed motion that the action was not filed or maintained with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and the law which warranted filing or maintaining the action.